Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Request for	)	
	)	
Declaratory Ruling Regarding	)	
the Use of Section 252(i) to Opt Into	)	CC Docket No. 99-143
Provisions Containing Non-Cost-Based	)	
Rates	)	

AMERITECH REPLY

The Ameritech Operating Companies (Ameritech) respectfully submit this Reply in the above-captioned proceeding.

I. INTRODUCTION

This Reply addresses a discrete issue that emerges from the initial round of comments in this docket: Assume, for the sake of argument, that section 252(i) of the 1996 Act permits a requesting carrier to adopt the reciprocal compensation provisions of an approved agreement. Assume further that a requesting carrier opts into the reciprocal compensation provisions of an agreement that says that the competing LEC that is a party to that agreement will charge the incumbent LEC the tandem interconnection rate. Does section 252(i) automatically entitle the requesting carrier to charge the same tandem interconnection rate, or is the requesting carrier entitled to charge that rate only if it makes for *its* switch the geographic area/functionality showing required by 47 C.F.R. § 51.711(a)(3) and paragraph 1090 of the *Local Competition Order* (hereinafter the "area/functionality test")? This issue, while subsidiary to other issues addressed in the initial round of comments, is nonetheless important; is plainly implicated by GTE's Petition; and is one that requires the Commission's attention.

Ameritech urges the Commission to clarify that section 252(i) does not entitle the requesting carrier *automatically* to charge the tandem interconnection rate in the approved agreement, as some carriers have contended. Rather, assuming that section 252(i) allows requesting carriers to opt into the reciprocal compensation provisions of an approved contract in the first place, a requesting carrier that does so is entitled to charge the tandem rate in that contract only if it establishes that its switch passes the Commission's area/functionality test.

The discussion that follows demonstrates why section 252(i) cannot properly be applied to allow automatic adoptions of the right to charge a tandem interconnection rate — and why it would be bad policy to allow such an application. First, however, we emphasize that this Reply assumes, for the sake of discussion, several propositions with which Ameritech disagrees, but that Ameritech is not disputing in this proceeding:

A. Ameritech believes that section 252(i) does *not* entitle a requesting carrier to opt into the reciprocal compensation provisions of an approved agreement. Section 252(i) entitles the requesting carrier only to adopt the interconnections, services and unbundled network elements in the approved agreement on the same terms and conditions as in that agreement, and reciprocal compensation is neither interconnection, nor a service, nor an unbundled network element, nor a term or condition of any of those. Ameritech has commented extensively on this point in another docket, however,[1/] and does not repeat those comments here. Thus, this Reply assumes, for the sake of discussion only, that section 252(i) does permit the adoption of reciprocal compensation provisions.

1/ *See* Ameritech Comments, filed April 12, 1999, in CC Docket No. 99-68, *In the matter of Inter-Carrier Compensation for ISP-Bound Traffic.*

B. The Commission has ruled that, subject to limited exceptions, reciprocal compensation rates are to be symmetrical, i.e., the rates that a competing LEC charges an incumbent LEC for transport and termination of local telecommunications shall be equal to the rates that the incumbent LEC charges the competing LEC. 47 C.F.R. § 51.711. Ameritech believes that that rule is contrary to the 1996 Act because, among other reasons, it is inconsistent with the requirement of section 252(d)(2) that each carrier charge for transport and termination based on its own costs. Again, however, Ameritech does not challenge Rule 711 in this proceeding.

C. The Commission has also ruled that when a competing LEC's switch performs functions similar to those performed by the incumbent LEC's tandem switch and serves a geographic area comparable to that served by the incumbent's tandem switch, the appropriate reciprocal compensation rate for the competing LEC to charge the incumbent LEC is the incumbent's tandem interconnection rate. 47 C.F.R. § 51.711(a)(3); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") at para. 1090. Ameritech believes that that rule is contrary to the 1996 Act for the same reasons that the symmetricality rule is contrary to the 1996 Act, and also because it is an additional, independent departure from the cost-based requirements of section 252(d)(2). Once more, however, this Reply assumes, for present purposes, the validity of the area/functionality test.

With the underbrush cleared away, the question remains: Making all the assumptions outlined above, does section 252(i) entitle a requesting carrier automatically to opt into a provision in an approved agreement that requires the incumbent to pay the competing carrier the

tandem interconnection rate? For the reasons set forth below, the answer is No; the requesting carrier can charge the tandem interconnection rate only if it establishes that *its* switch passes the area/functionality test.

II. DISCUSSION

There really should be no debate about the question this Reply addresses. The theory underlying the Commission's rule that permits *some* competing LECs to charge a tandem interconnection rate even though they do not have a tandem switch is that "new technologies (*e.g.*, fiber ring or wireless networks) [may] perform functions similar to those performed by an incumbent LEC's tandem switch and [in such instances], . . . some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." *Local Competition Order* at para. 1090. Obviously (one would think), what the Commission had in mind was that *if* (but only if) a competing LEC could show that *its* switch met the test, *that* LEC could charge the tandem rate.

Some competing LECs do seem to acknowledge that section 252(i) cannot be used to opt into the right to charge a tandem rate. *See, e.g.,* Joint Comments of the Association for Local Telecommunications Services, Choice One Communications Corporation and Hyperion Telecommunications, Inc., at 10-11 ("Where underlying agreements contain separate rates for end office and tandem switching, the geographic area served by the opting-in carrier's switch will determine how that carrier's switch will be treated for compensation purposes").[2/] Other

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[2/] Ameritech does not agree with the ALTS, et al., formulation of the area/functionality test, but that does not matter for present purposes. The only question here is whether the characteristics of the "opting-in carrier's switch" will determine whether that switch will be treated as a tandem for compensation purposes.

competing LECs, however, appear to have crafted their comments to preserve the possibility of automatic 252(i) adoptions of the right to charge tandem rates (*e.g.*, Comments of NEXTLINK Communications and Advanced Telecom Group, at 9), and some competing LECs have taken the position elsewhere that section 252(i) entitles them to make such adoptions.

The Commission should clarify that section 252(i) cannot be interpreted to permit requesting carriers to opt into a provision in an approved contract that gives the competing LEC the right to charge a tandem rate. Such an interpretation of the statute would render the Commission's area/functionality test meaningless — for all but one competing LEC in each state. For after one carrier made the requisite showing and obtained the tandem rate, every other carrier in the state could claim the tandem rate as a matter of law. Neither Congress, nor the Commission, can have intended such an absurd result, and from a policy perspective, it would be a disaster: If every competing LEC could opt into the right to charge a tandem rate regardless of the characteristics of its own switch, competing LECs would be encouraged to use the lowest cost technology on the market (even if it is the least efficient) in order to maximize profits; they would have no reason to invest in a more expensive, more efficient switch in order to qualify to charge the tandem rate.

The only remotely arguable ground for allowing a section 252(i) opt-in to a tandem rate is a hyper-literal application of section 252(i) — an application so wooden and mindless that Congress cannot possibly have intended it. *See, e.g.,* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("We need not leave our common sense at the doorstep when we interpret a statute"); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1949) ("A literal reading of [a statute] which would lead to absurd results is to be avoided when [it] can be given a reasonable

application consistent with its words and with the legislative purpose"). All competing LECs recognize that there must be *some* practical, common sense, limit to the mirroring that section 252(i) allows; otherwise, 252(i) agreements would have to include the same interconnection points and even the same carrier names as the underlying agreements. But just as the CLEC's name and the CLEC's points of interconnection are peculiar to the CLEC — and thus are not mechanically carried over into the 252(i) agreement — so are the attributes of the CLEC's switch and, consequently, the CLEC's entitlement (or non-entitlement) to charge a tandem rate.

The Supreme Court decided a case in 1868 based on enduring legal principles that explain why section 252(i) must not be applied so mechanically as to yield the absurd result of allowing automatic opt-ins to the right to charge a tandem rate. A man named Farris was indicted for murder in Kentucky. Farris was a mail carrier, and a sheriff arrested him while he was carrying the mail, via steamboat, from Louisville to Cincinnati. The sheriff was then indicted for violating a federal statute that made it a crime to "knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same."

When the case reached the United States Supreme Court, the prosecutor cited precedents for the proposition that the arrest of Farris was, under the literal terms of the statute, a criminal obstruction of the mail. The Supreme Court, however, held that the sheriff had not broken the law:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. . . .
>
> The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in

> the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling . . . that the statute . . . which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison on fire -- "for he is not be hanged because he would not stay to be burnt." And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder.

United States v. Kirby, 74 U.S. (7 Wall.) 482, 486-87 (1868).

To allow a competing LEC to opt into the right to charge a tandem interconnection rate on the theory that a literal reading of section 252(i) justifies that result makes no more sense than to send a sheriff to jail for detaining a mail carrier who has been indicted for murder, or prosecuting for escape a prisoner who flees a burning prison.

III. CONCLUSION

Ameritech urges the Commission to clarify that a carrier that opts into the reciprocal compensation provisions of an approved interconnection agreement under section 252(i) of the 1996 Act (assuming, *arguendo*, that reciprocal compensation provisions are subject to section

252(i)) is not entitled to charge the incumbent carrier a tandem interconnection rate unless the requesting carrier establishes that its switch meets the test that the Commission promulgated in 47 C.F.R. § 51.711(a)(3) and paragraph 1090 of the *Local Competition Order*.

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Respectfully Submitted,

BTB

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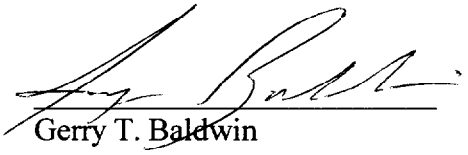
CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 1999, I caused copies of the foregoing "Ameritech Reply" to be served on the persons on the attached Service List by United States mail, first class, postage prepaid or, where indicated, by messenger.



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